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IN THE

Supreme Court of the United States

October Term, 1958.

No. 729

ELISABETH BYRNE, Administratrix of the Estate of JOE G. IRBY, Deceased,

Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No.

ELISABETH BYRNE, ADMINISTRATRIX OF THE ESTATE OF JOE G. IRBY, DECEASED,
Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To The Honorable the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

The Pennsylvania Railroad Company, Petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 16, 1958 affirming the judgment entered in favor of the Respondent in the United States District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW.

The opinion of the Court of Appeals, which is appended hereto, is reported in — F. 2d — (3d Cir. 1958). The opinion of the District Court, which is appended hereto, denying petitioner's motions for judgment n.o.v. and a new trial, is reported in — F. Supp. — (E. D. Pa. 1958).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 16, 1958. A timely petition for rehearing was denied on January 9, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. section 1254(1).

QUESTION PRESENTED.

Where an electrical manufacturing corporation is employed as an independent contractor in the servicing of an electric locomotive which it has sold to a railroad, is the administratrix of its employee, who was killed while within the scope of its employment, entitled to recover damages from the railroad under the Federal Employers' Liability Act on the theory that his work on the locomotive rendered him the common employee of both the contractor and the railroad?

STATUTE INVOLVED.

The Federal Employers' Liability Act, 45 U. S. C. section 51, provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of

kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE.

This action was brought under the Federal Employers' Liability Act [1] by the Respondent, Administratrix of the estate of a deceased electrical engineer, against the Petitioner, The Pennsylvania Railroad Company, to recover damages for the death of Joe G. Irby, an employee of Westinghouse Electric Corporation, who was killed in the course of such employment.

When this case came on for trial before Judge Kirkpatrick in the Eastern District of Pennsylvania, the Court directed that there be a severance of the issues, with the question of employment first being submitted to the jury and thereafter the issue of liability (26a). At the conclusion of the first portion of the trial Judge Kirkpatrick in-

1. In the alternative, damages were also claimed under the Wrongful Death and Survival Statutes of the State of Delaware. However, in view of the jury's and lower courts' determination as to the employment question under the Federal Employers' Liability Act, the questions arising under Delaware law are no longer in the case.

structed the jury that Irby was at all times an employee of Westinghouse (353a) and the jury found that Irby, at the time of his death, was also an employee of the Railroad (364a). In the second portion of the trial the jury found in answer to special interrogatories that Irby's death resulted from carbon dioxide asphyxiation caused or contributed to by negligence of the Railroad and from electrocution caused or contributed to by the negligence of the Railroad. The jury returned a verdict for the Respondent in the sum of $250,000. The Petitioner filed motions for judgment n.o.v. and for a new trial, which were denied in an opinion by Judge Kirkpatrick on March 4, 1958. Thereafter Petitioner appealed and on December 16, 1958 the United States Court of Appeals for the Third Circuit rendered a decision affirming the judgment entered in favor of the Respondent. The Petitioner filed a timely Petition for Rehearing, which was denied on January 9, 1959.[2]

The decedent, a 29-year-old electrical engineer, entered the employment of Westinghouse in 1944 and during the trial it was conceded by counsel for the Respondent that the deceased was in Westinghouse's employment at all times prior to his death (311a). Irby's duties required him to engage in what was known as "follow" (75a-76a, 267a-268a). "Follow" involved assignment to specific units of Westinghouse equipment (such as an MU train or a locomotive) upon their delivery to a railroad purchaser and the servicing of the equipment until it was in satisfactory operating condition (182a). For fourteen months prior to his death, Irby had been engaged in the "follow" of an electric locomotive which was entirely new in theory and design (110a) and which Westinghouse had sold the Railroad. His

2. One of the grounds set forth in support of the Petition for Rehearing was that the Court erred in its opinion when it stated that the Railroad could not have lawfully issued a pass to Irby unless he was a Railroad employee. On January 9, 1959 the Circuit Court entered an order, which is appended hereto, deleting from its opinion that portion which referred to the lawfulness of the pass issued to Irby.

duties on behalf of Westinghouse required him to ride it when it was off the road, to inspect its electrical equipment, to make adjustments and repairs and to eliminate all causes of difficulty preventing its efficient operation (163a-164a).

The locomotive itself bore a general warranty which expired twelve months after delivery but it was equipped with certain tubes known as "ignitrons", which effected the change in the current and which bore a warranty of thirty-six months (120a). From the moment of its delivery to the Railroad there were constant electrical breakdowns and many failures of the ignitron tubes (225a-226a). Westinghouse's difficulties with the locomotive continued for two years, during which time there was constant trouble with it (225a-226a). In consequence, the manufacturer was obliged to make three radical changes in its design (243a).

The contract governing the sale of the locomotive provided for the payment of a fixed price subject to certain adjustments, and the Railroad ultimately paid $777,950, for it (169a). The warranty clauses were embodied in the contract of sale but there was no express provision with respect to "follow" (126a, 168a). However, the evidence showed that it was common practice for manufacturing companies to have their representatives follow the equipment which they sold to railroads (126a-127a, 182a-183a). Officials of Westinghouse testified that the necessity for "follow" existed irrespective of contract or warranty and was the result of the manufacturer's concern for "the integrity of its product" (180a-181a, 268a). The Railroad likewise recognized the necessity for "follow" and supplied passes for twenty-eight Westinghouse employees whose duties required them to travel on Pennsylvania Railroad equipment for that purpose (163a, 304a-305a). It also furnished the Westinghouse engineers with Railroad maintenance personnel to assist them in their work (321a).

When Irby had to make major adjustments on the locomotive he timed them for the period of its monthly inspection, which the Railroad was obliged to make under the rules

of the I. C. C. (51a). At that time the locomotive was taken out of service for several days and hence his work did not interfere with its operation (218a-219a). It was while he was completing the repair of a generator during such an inspection period that his fatal accident occurred. It had been determined by Irby and his supervisor, Coleman (an employee of Westinghouse), that this work should be performed without expense to the Railroad since they recognized that the repair constituted a Westinghouse job and was within its responsibility (219a).

The evidence of continuous and exclusive Westinghouse employment was overwhelming. Irby was hired by Westinghouse (183a), received his work assignments from it (185a, 292a) and could have been removed by it from the job (248a, 310a) or been fired by it (204a). The Railroad, on the other hand, had not hired him (76a), did not assign him work (73a), had no power to hold him on or to remove him from the job and could not fire him (327a). He received from Westinghouse his pay, which during the year prior to the accident amounted to $9237.20 (298a). Of that amount, $3906.22 represented overtime pay for 1622 hours (all performed for Westinghouse) over and beyond his regular 40 hours per week (315a, 317a). The Court of Appeals noted (App. p. 11) that Irby thus worked an average of 72 hours "in the course of his regular employment" almost week in and week out. He received no remuneration from the Railroad (76a) and it did not reimburse Westinghouse for Irby's pay (253a). He reported his hours of work, his work activities and the condition of the locomotive in regular reports which he made to Westinghouse (104a, 153a, 186a-187a, 220a, 290a). He likewise reported to it all expenses which he incurred and he received reimbursement for these from his employer (222a). He made no written reports of any kind to the Railroad (81a, 112a, 223a, 328a) and his reports to Westinghouse were not passed on to the Railroad (113a). He was a member of a

union of Westinghouse employees and was not a member of any Railroad Brotherhood (262a).

Irby performed his work under the close supervision of Coleman, a service supervisor of Westinghouse (215a, 291a-292a), who gave him instructions (214a, 270a-271a) and made his work assignments (185a, 214a, 292a). Coleman would meet with Irby at least three or four times a week and they would review the work together (213a-214a). The evidence showed without contradiction that Irby continually took instructions from Coleman and from Westinghouse's engineering department, to whom he made a full report with respect to the difficulties he encountered on the locomotive (104a, 186a-187a, 220a, 290a). No railroad employee undertook at any time to supervise the performance of Irby's work while he was on the locomotive (283a, 323a) nor did the railroad supervisory force recognize any right to instruct him in his work (92a, 324a). He received no work assignments from the Railroad (73a, 94a). He secured his promotions from Westinghouse (183a-184a) as well as his work classifications (183a). Had he lived to retirement age, he would have received a pension from Westinghouse (285a).

In complete disregard of this uncontradicted evidence, the Court of Appeals ruled that the Railroad could not make use of the Westinghouse employee

> "having him 'do its work' and exercising the 'right to control' him, accompanied by other incidents usually connected with employment, and escape the responsibility imposed by the federal statute" (App. p. 13).

No effort was made by the court to explain how the Railroad had obtained such "right to control" or what the "other incidents usually connected with employment" could be. The court was merely content to explain (App. pp. 13-14):

> "The evidence as to Irby's employment looks two ways and it is *impossible indeed to draw a line of demarcation between the work Irby performed for Westing-*

house and that which he did for the Railroad. The evidence would support the conclusion that he was, to some extent at least, a common employee of both." (Emphasis supplied.)

It was indeed impossible to draw a line of demarcation between the work Irby performed for Westinghouse and his alleged work for the Railroad because by hypothesis he was *at all times* working for Westinghouse. That fact the Court clearly lost sight of, even when it found that "he was, to some extent at least, a common employee of both".

During the portion of the trial involving the employment question, the Railroad attempted to introduce certain evidence to show the full extent of Westinghouse control and other indicia of Westinghouse employment in order to prove that the Railroad could not have been a party to a simultaneous employment relationship with Irby. This evidence would have showed: (a) That on the basis of a representation that Irby was a Westinghouse employee at his death, Irby's widow had received group life insurance benefits of $32,500 under a Westinghouse policy and Workmen's Compensation benefits of $10,514.20 from Westinghouse's insurance carrier, and (b) the great concern of Westinghouse officials over the length of time that Irby's "follow" was lasting and its cost (199a-207a, 307a-309a, 845a-863a). The evidence was excluded as cumulative since Irby's continuous employment by Westinghouse had ceased to be in dispute when counsel for the Respondent abandoned the contention that Irby was a borrowed employee (311a). The Court of Appeals affirmed that ruling of the lower court.

The evidence relied on by the lower courts to sustain the verdict showed merely that the Railroad derived a benefit from the work which Irby performed in his activities on the locomotive on behalf of Westinghouse. He was on call by the Railroad to do repair work when the locomotive broke down but that was because Westinghouse, which had

warranted the locomotive's performance and was responsible for its condition during a period of months after delivery, had supplied the employees engaged in "follow" to keep the locomotive in efficient operation. There was also testimony that certain work with respect to the repairs could have been performed by Railroad employees had Irby not been on hand to do the work. There was, however, no evidence whatever that any of his work was performed as a Railroad employee under Railroad supervision.[3]

REASONS FOR GRANTING THE WRIT.

1. The decision below extends the application of the FELA far beyond the contemplation of Congress and is in conflict with leading decisions of this Court and with those of the lower federal courts:

(a) The decision of the Court below is in conflict with *Robinson v. Baltimore & Ohio R. R.*, 237 U. S. 84 (1915) and the numerous federal decisions following that case. The ruling of the Court below has materially enlarged the class of persons to which the FELA applies by including within its scope a purely fictitious employer-employee relationship in contravention of the declaration of the *Robinson* case that the word "employee" as used in the FELA is employed in its natural sense and is intended to describe the conventional relationship of employer and employee;

3. There was evidence that on one single occasion a locomotive engineman required Irby to call signals and to maintain a look out along the right of way, work which had nothing to do with his Westinghouse employment (146a-148a). The Westinghouse records showed that he did not work on that particular day (New Years Day, 1953) (86a) and at most this evidence perhaps showed that he was a "borrowed employee" for one day, though there was no evidence whatever to establish that any authorized person had inducted him into the service of the Railroad Company for even as much as that day. (See Opinion of the Court of Appeals, App. p. 12.)

(b) By sanctioning the jury's finding of Railroad employment the decision below is in conflict with the decisions of this Court in *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U. S. 28 (1928); *Hull v. Philadelphia and Reading Railroad Company*, 252 U. S. 475 (1920); *Chicago R. I. & P. R. Co. v. Bond*, 240 U. S. 449 (1916) and *Standard Oil Company v. Anderson*, 212 U. S. 215 (1909). It is also in conflict with prior decisions in the same circuit: *Del Vecchio v. P. R. R.*, 233 F. 2d 2 (3d Cir.) *cert. den.* 352 U. S. 909 (1956); *Shaw v. Monessen S. W. Ry.*, 200 F. 2d 841 (3d Cir. 1953); *Dochenetz v. P. R. R.*, 60 F. 2d 808 (3d Cir.) *cert. den.* 287 U. S. 665 (1932); *Kelly v. P. R. R.*, 245 F. 2d 408 (3d Cir.) *cert. den.* 355 U. S. 892 (1957); and with decisions in other circuits: *Gaulden v. Southern Pac. Co.*, 78 F. Supp. 651 (N. D. Calif. 1948) *aff'd per cur.* 174 F. 2d 1022 (9th Cir. 1949); *Dougall v. Spokane, P. & S. Ry.*, 207 F. 2d 843 (9th Cir. 1953); *Jones v. N. Y. C. R.*, 182 F. 2d 336 (6th Cir.), *cert. den.* 340 U. S. 850 (1950); *Allen v. Erie R. Co.*, 2 F. 2d 712 (6th Cir. 1924).

2. The decision of the court below creates an entirely new concept of dual employment never heretofore recognized by the courts. It permits recovery by an employee of an independent contractor doing work for a railroad on the sole basis that the performance of such work by the contractor warrants a finding that the contractor's employee carrying out that work becomes ipso facto an employee of the railroad.

3. The decision of the court below completely overlooks the fundamental characteristics of the independent contractor concept, namely, the non-employment by the railroad of the independent contractor's employees. The effect of a decision which imposes upon a railroad the employment of another's employees, contrary to the parties' intentions and without their agreement, will be to destroy a long-standing and widespread business practice, valuable

to both parties alike, of using independent contractors to perform many varieties of work within the railroad industry.

4. The decision of this Court in *Sinkler v. Missouri Pacific Railroad*, 356 U. S. 326 (1958) has created a measure of doubt as to whether employees of independent contractors may come within the provisions of the FELA. While the factual situation in that case differed materially from the facts in the case at bar and its holding is not inconsistent with the earlier ruling in *Robinson v. Baltimore & Ohio R. R.*, 237 U. S. 84 (1915), which is distinguished in the *Sinkler* decision at page 331, nonetheless some language in the opinion has lent encouragement to the view that the employees of independent contractors dealing with railroads may be found to be entitled to the benefits of the FELA. That thought has been furthered by the grant of certiorari on November 10, 1958 in *Baker v. Texas & Pacific Railroad*, 358 U. S. 878, though the decision in that case may turn on whether the true employer was an independent contractor or on procedural grounds. The decision of the court below in the case at bar not merely casts doubt upon the subject but in effect rules that an employee of an independent contractor is within the provisions of the Act. A grant of certiorari in this case would provide an opportunity for this Court to dispel all doubt on a question which is of vital importance to all railroads, all independent contractors which have dealings with them and all employees of such contractors.

ARGUMENT.

Introduction.

The basic reason why petitioner believes that in this case a writ of certiorari should be granted lies in the fact that the decision in the court below overturns a long line of well established decisions of this Court and other federal courts and for the first time permits recovery under the FELA by a person who is not a railroad employee.

Under Point I of our argument we review those cases which show that this Court and the lower federal courts have always denied FELA recovery to the employees of independent contractors because the word employee as used in that Act is employed in its natural sense and intended to describe the conventional relationship of an employer and employee.

Under Point II we review the evidence which established beyond dispute that the decedent's true employer, Westinghouse Manufacturing Company, was in fact an independent contractor and acting as such at all times relevant to this case.

Under Point III we contend that the reasoning of the lower courts in support of their conclusion that the facts of the case presented a jury issue as to the decedent's employment by the Railroad is in conflict with the principles governing the determination of employment established by the decisions of this Court and the lower federal courts.

Finally, under Point IV we point out that the lower courts were not justified in ignoring the normal concomitants of the independent contractor relationship which existed in this case.

Point I.

The Lower Court Has Permitted a Recovery Under the FELA by an Employee of an Independent Contractor Despite the Consistent Decisions of This and Other Courts That Such Employees Are Not Within the Provisions of That Act Even Though the Work They Are Doing Is of Benefit to the Railroad and Is Scheduled by It for Its Own Convenience.

Since the decision in *Robinson v. B. & O. R. Co.*, 237 U. S. 84 (1915), forty-four years ago, this Court and the lower federal courts have unconditionally rejected the contention that employees of independent contractors who have been injured while doing railroad work are entitled to the benefits of the FELA. Until the decision in the case at bar, no such employee has been permitted to recover unless the railroad company had actually borrowed him from his contractor-employer. The plaintiff conceded, and the lower courts have agreed, that the decedent was not a borrowed employee in the case at bar.[4]

A very brief review of the leading cases will show how faithfully the federal courts have adhered to the doctrine set forth in the *Robinson* case that employees of independent contractors cannot recover under the federal act since the word "employee" as used in the Federal Employers' Liability Act is employed in its natural sense and is intended to describe the conventional relations of an employee and an employer.[5] In *Robinson*, a Pullman porter

4. Respondent's counsel made the concession during the course of the trial of the employment issue (311a) and subsequent important rulings on evidence were based upon that concession. Judge Kirkpatrick noted in his opinion that "the plaintiff in this case does not dispute that Irby was at all relevant times in the employ of Westinghouse . . ." (App. p. 2). The Court of Appeals conceded "There is, of course, no question but that Irby was an employee of Westinghouse" (App. p. 13) but added that "the evidence would support the conclusion that he was, to some extent at least, a common employee of both" (App. pp. 13-14).

5. 237 U. S. 84, 94 (1915). This doctrine was accepted by the Court of Appeals which quoted that statement (App. p. 15).

was held to be an employee of an independent contractor and, in consequence, outside the FELA, even though his duty included the collection of tickets on behalf of the railroad. In *Chicago R. I. & P. R. Co. v. Bond*, 240 U. S. 449 (1916), an independent contractor, who was engaged in coaling activities on the railroad, was held not to be entitled to the benefits of the Act despite evidence that he received directions, cooperation and assistance from the railroad itself. *Hull v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475 (1920) and *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U. S. 28 (1928), involved *railroad* employees in crews working on connecting lines at the time of their injury. In *Hull*, the right of the employee was said to be limited to recovery against his own employer since the latter controlled the operation of its own train on the connecting line. The Court cited *Robinson* and reasserted the principal that the word "employee" in the FELA is used in its conventional sense. In *Linstead*, on the other hand, recovery was permitted against the connecting carrier because the evidence showed that he was a borrowed employee within the scope of employment by his temporary master. In *Docheney v. Pennsylvania Railroad*, 60 F. 2d 808 (3d Cir.), cert. denied, 287 U. S. 655 (1932), a steel company employee was held outside the FELA though the work for his employer was closely interwoven with the work of the defendant railroad. In *Gaulden v. Southern Pac. Co.*, 78 F. Supp. 651 (N. D. Calif. 1948), aff'd per cur. 174 F. 2d 1022 (9th Cir. 1949), a Pacific Fruit Express employee was denied FELA recovery where the railroad, despite its lending of assistance and cooperation, in fact had no control over the P. F. E. operation. Similarly, in *Jones v. N. Y. C. R.*, 182 F. 2d 326 (6th Cir.), cert. den. 340 U. S. 850 (1950), a Railway Express employee was held to be outside the provisions of the Act though the railroad company derived revenue from the results of his efforts. In *Norman v. Spokane P. & S. Ru.*, 101 F. Supp. 350 (D. Ore. 1950), aff'd per curiam, 192 F. 2d 1020 (9th Cir. 1951), cert. denied, 342 U. S. 945 (1952), the

employee of an independent contractor hired to repair a railroad bridge was denied recovery. In *Dougall v. Spokane P. & S. Ry.*, 207 F. 2d 843 (9th Cir. 1953), the employee of an independent contractor, who was engaged in cleaning ditches along the railroad's right of way, was held outside the Act despite the claim that he was doing regular railroad work. In *Shaw v. Monessen S. W. Ry.*, 200 F. 2d 841 (3d Cir. 1953), a steel company employee was denied recovery though injured while doing railroad work in circumstances which provided some indicia of railroad employment.[6] In *Del Vecchio v. P. R. R.*, 233 F. 2d 2 (3d Cir.), cert. den. 352 U. S. 909 (1956), plaintiff was an employee of an independent contractor which was loading coal on behalf of the railroad. Recovery was denied though the railroad was under an obligation to perform the work in accordance with provisions of its tariffs. In *Kelly v. P. R. R.*, 245 F. 2d 408 (3d Cir. 1957), cert. den. 355 U. S. 892 (1957), a General Electric employee was denied recovery despite efforts to show that his work was regular railroad work and for the benefit of the railroad defendant.

It will be noted that several cases in addition to *Linstead v. Chesapeake & Ohio Ry. Co.*, have gone the other way, but upon examination of their facts it will readily be seen that they no more contravene the basic and well established principle of the *Robinson* case than did the decision in the *Linstead* case. Thus *Atlantic Coast Line R. R. Co. v. Tredway*, 120 Va. 735, 93 S. E. 560 (1917),

6. The Court of Appeals in the case at bar distinguishes the *Shaw* case on the ground, inter alia, that there was no contention that Shaw was an employee of both the Railroad and his true employer the steel company and "the issue of common employment was not presented to the court". For that reason the suggested "inconsistency (between the two cases) is more apparent than real for the issue was not in focus in *Shaw v. Monessen*. . . ." (App. p. 17). In other words, the Court below appeared to believe that even though it had been unable to find Shaw an employee of the railroad when the issue was whether he was an employee of the railroad or the steel company, it might have had no difficulty in doing so had it merely been argued that he was an employee of both.

heavily relied upon by respondent, permitted recovery by an employee of one railroad company against a connecting carrier where it was shown that the two railroads had a community of interest in the work which was performed by the injured employee and that he was in fact at the moment of his injury the servant of the second carrier. *Cimorelli v. New York Central R. Co.*, 148 F. 2d 575 (6th Cir: 1945), permitted recovery by an employee of a contractor which was doing loading work for the railroad under conditions which clearly showed that his employer was not in fact an independent contractor. The same situation was true in the cases of *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161 (6th Cir. 1947) and *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6th Cir. 1949). *Sinkler v. Missouri Pacific*, 356 U. S. 326 (1958), involved FELA liability to the railroad's employee for negligence of a connecting carrier which was performing the railroad's work on an independent contractor basis. Recovery was permitted because the Act makes carriers liable for the negligence of their officers, *agents* and employees,[7] but this Court in a footnote specifically recognized the difference between the issue which it had before it and that in the *Robinson* case, *supra* page 13. Section 1 of the Act provides a remedy to employees of the carrier only and not to the employees of agents as well.

From the foregoing review of the leading cases it is apparent that, despite the efforts and ingenuity of counsel who have repeatedly sought to broaden the scope of this remedial legislation and make it apply to every one who works on railroad premises, this Court and the lower federal courts have consistently adhered to the doctrine that the Act covers only employees within the conventional meaning of the term. In the case at bar, however, the pertinacity of counsel has been rewarded. A method of recovery has been accepted by the lower courts, which sustained an FELA verdict in favor of the estate of a servant of an independent

7. 45 U. S. C. A. § 51.

contractor. If the decision of the court below is upheld by this Court, the precedent will enable all other employees of independent contractors performing railroad work to recover under the FELA from railroads who are not their employers.

The basis of the plaintiff's claim that a jury issue was presented on employment by the Railroad, the invalidity of that contention and the reasoning of the lower courts in sustaining it, are discussed below under Point III.

Point II.

Irby Was the Employee of an Independent Contractor.

The evidence established beyond question that Irby was the employee of Westinghouse Manufacturing Company and that the latter was an independent contractor. His employment by Westinghouse at all times during his service on the locomotive was conceded by the plaintiff during the trial and was acknowledged by both the District Court and the Court of Appeals.[8] Plaintiff also conceded during the trial that Irby was not a loaned servant (311a), and very important rulings on evidence by the trial judge were based upon the established fact that Irby was at all times within the employ of his true employer, Westinghouse, and not borrowed by the Railroad. The sole issue submitted to the jury was whether he was an employee of both Westinghouse *and* the Railroad at one and the same time.

It is equally beyond dispute that Westinghouse was an independent contractor, though the fact was neither conceded by the plaintiff nor formally acknowledged by either

8. Judge Kirkpatrick stated, "The plaintiff in this case does not dispute that Irby was at all relevant times in the employ of Westinghouse . . ." (App. p. 2). The Court of Appeals stated "There is, of course, no question but that Irby was an employee of Westinghouse" (App. p. 13) and that he was such *at the time of his death* (App. p. 8).

of the lower courts. While neither of those courts so much as mentioned the nature of the relationship between the Railroad and Westinghouse[9] a reading of the two opinions shows that it is implicit in both of them that neither court questioned the independence of the Westinghouse contractorship.

It will suffice to restate briefly the nature of Westinghouse's activities in this case, there being no controversy with respect to any of them and there being no additional factors which would place its relationship with the Railroad in any different light.

The Railroad bought two new electric locomotives from Westinghouse in 1949 and both companies signed an "Agreement for the Purchase" (823a) which included certain warranties by the seller. The Railroad paid $777,950 for the locomotive in which Irby was killed (169a). It was known as a "Rectifier Locomotive" since it carried ignitron tubes which converted the alternate current to direct current, and was one of an entirely new design (110a). In view of the highly complicated nature of the electric circuits the Railroad was not prepared to assume full responsibility for their maintenance at the time of delivery, and the parties followed the usual course, which is adhered to in connection with all sales of expensive, intricate equipment: the seller assigned several technicians to ride the locomotive, check its performance and see that it was properly operated and maintained (126a-127a, 182a-183a). It

9. The Court of Appeals treated the Railroad and Westinghouse as though they were merely vendor and vendee and observed that "there was no contract between Westinghouse and the Railroad insofar as Irby's services were concerned" (App. p. 11) but a little further on in the opinion it referred to "manufacturers *or contractors* such as Westinghouse" (App. p. 13). In any case, the record was replete with evidence that all of Irby's work was performed within the framework of a complete understanding between the two companies and in accordance with long standing custom. Thus, the Court of Appeals accepted and characterized the transaction as within "the facts of business life" (App. p. 13).

should again be noted that there is no contention that these men, of whom Irby was one, were loaned to the Railroad.[10] On the contrary, they were engaged in what is known as "follow" on behalf of their employer, Westinghouse, which was interested in (1) preserving "the integrity of the product", i.e., making sure that the locomotive would operate efficiently and not be damaged by unskilled operation or maintenance (180a-181a, 268a); (2) testing its performance so as to improve the locomotive's design (three radical changes in the design of the electric circuits were made during the course of the "follow") (243a); and (3) correcting equipment failures, not only because Westinghouse hoped to sell many of this new type locomotive to the Railroad if it proved to be a success but also because Westinghouse was liable to the Railroad for such failures under the terms of its warranties (120a, 356a).

There was no issue as to the fact that the entire supervision of Irby's work was provided by his Westinghouse supervisor (214a-215a, 291a-292a); that all of his activities were authorized by Westinghouse and within the scope of his Westinghouse employment (185a, 214a, 292a); and that his work reports were made exclusively to it (118a, 186a-187a, 223a, 328a).

The Court of Appeals recognized the validity of the practice of "manufacturers or contractors such as Westinghouse requir[ing] field representatives to follow-up on sales to assure the satisfaction of their customers and to foster and protect known and established reputations for quality" and that "with expensive and intricate machinery such as electric locomotives, the follow-up period is of necessity lengthy and requires close cooperation with the purchaser of the equipment" (App. p. 13). There is also not the slightest suggestion in that court's opinion and no shred of evidence in the record to the effect that Westing-

10. See footnote 8, *supra*, p. 17.

house was engaged in the following of the locomotive on any basis other than that of a completely independent contractor.[11]

Point III.

There Was No Valid Basis for a Jury Finding That Decedent Was the Employee of the Railroad and of an Independent Contractor at the Same Time.

Since during the trial the plaintiff was obliged to abandon the contention that Irby was a regular Railroad employee as well as the contention that he had been loaned by Westinghouse to the Railroad, the case narrowed down to the issue of whether an FELA recovery could be sustained on the basis of dual employment. Both the trial court and the Court of Appeals have ruled that the recovery can be justified on that ground alone. Thus the theory is presented that, although Irby was at all times a regular employee of an independent contractor, Westinghouse Manufacturing Company, and at all times engaged in the performance of its work he was also an employee of The Pennsylvania Railroad Company for whose benefit the work of that contractor (and consequently his work) was being performed.

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11. The Court of Appeals noted that there was no contract between Westinghouse and the Railroad insofar as Irby's services were concerned (App. p. 11) but it recognized that there was a sales agreement containing warranties, and that "the facts of business life" demonstrate that manufacturers or contractors such as Westinghouse require field representatives to follow-up on sales to protect known and established reputations for quality (App. p. 13). The court further showed that the follow-up period is necessarily lengthy and requires close cooperation with the purchaser of the equipment (App. p. 13). Obviously the field-men worked upon the equipment under agreement between the contractor and the purchaser, which even went so far as to supply the contractor's employees with railroad passes to facilitate their work. The mere absence of a written contract governing Irby's employment would no more destroy Westinghouse's status as an independent contractor in this case than would it have if the Railroad called in a Westinghouse mechanic for a single specific job of repairing any other piece of Westinghouse equipment.

We submit that in thus permitting a jury to find that Irby was an employee of an independent contractor and, at the same time, an employee of the Railroad on whose equipment the contractor was working; the Court of Appeals has permitted the establishment of a new employer-employee relationship never heretofore recognized in the law. All of the cases following *Standard Oil Company v. Anderson*, 212 U. S. 215 (1909), have recognized that in this particular situation, i.e., where a railroad company or other industry has part of its work performed by a third person, the court will examine the true situation and determine whether the employee is in fact an independent contractor or whether he is embraced within the service of the railroad as its own employee. But assuming the independence of the contractor, the employee has never been held to be the servant of both at the same time.[12]

The District Court and the Court of Appeals both refused to come to grips with the real problem in this case and failed to recognize that they were emasculating the independent contractor relationship. Judge Kirkpatrick, in the District Court, sustained the jury verdict of employment on the sole ground that Railroad employment could be predicated upon a jury finding that the Railroad received the benefit of Irby's work. He rejected the traditional test of power of control as the determining factor in the solution of the issue of employment and completely failed to recognize, or at least to acknowledge, that if mere benefit from the work could constitute the basis of an employment relationship, then all employees of independent contractors

12. It is of course true that circumstances may be imagined where an employee of an independent contractor might be employed in a particular job separate and apart from his regular work for the contractor where both the railroad and the contractor would intend that he be the employee of both of them at the same time and where he would in fact be performing work under the control of both masters. Such circumstances would not be normal nor would they embrace the situation in the case at bar where the decedent was at all times engaged in his regular employment by the independent contractor.

performing work on behalf of railroads would become employees of the carrier and within the FELA. This is necessarily so since the work which an independent contractor performs on behalf of a railroad will, in practically all instances, be of benefit to the carrier. Thus if Judge Kirkpatrick's test were sound, the word employee as used in the Act could no longer be interpreted in its traditional and conventional sense.

The Court of Appeals made no attempt to sustain the verdict on the basis of Judge Kirkpatrick's test. It was content to acknowledge the validity of the traditional tests of right to control,[13] and whose work is being done.[14] It placed its decision squarely on the ground that, from the mere fact that Irby was performing regular railroad work on behalf of his employer, Westinghouse Manufacturing Company, the jury was entitled to find "that the Railroad had a right of control over Irby and that he was engaged in maintaining its services, i.e., doing its work" (App. p. 16).

Thus, the Court of Appeals arrived at the same conclusion as Judge Kirkpatrick, not on the basis that the Railroad received the benefit of Irby's work but on the

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13. The Court of Appeals stated:

> "But the 'right to control' is a conclusion to be drawn from a consideration of all the relevant facts of the relationship between the worker and those whose work he does and, as is pointed out in both Standard Oil Co. v. Anderson and Linstead v. Chesapeake & Ohio Ry., *supra*, the question of 'whose work is being done' is a factor which the jury must consider in determining the 'right to control'. We point out that the phrase 'right to control' is not a single magical solvent for the 'right to control' must be considered in the light of other incidents relating to the work performed. Thus the status of employment is established" (App. p. 16).

This is not, we submit, a helpful statement of the law for the purposes of either a court or jury. To the layman who may seek a guide as to when he will or will not find himself subject to liability as an employer, the Court's language will scarcely convey any meaning.

14. There are comments in the opinion, however, indicating that the court had some doubts as to the validity of the latter test (App. pp. 17-18).

ground that since the work of the contractor was Railroad work, i.e. work which could otherwise have been performed by railroad employees, and over which the Railroad necessarily had *some* measure of control, that fact alone furnished a justification for a jury finding that Irby was a Railroad employee.[15]

The Court of Appeals thus was willing to close its eyes, just as had the District Court, to the patent fact that the decision in this case constituted nothing more than an assertion that whenever an independent contractor performs, on behalf of a railroad, work which might be performed by the railroad's own employees and might hence be characterized as railroad work, the mere performance of that work, irrespective of its specialized nature, may give rise to an

15. There was not a scintilla of evidence in the record to support the assertion that Irby was ever under the supervision of any railroad official or that he ever performed any railroad work of any kind except as part of his regular Westinghouse work, for which he received large overtime payments from that company. Thus it was his Westinghouse duty to keep the locomotive in running condition, which required him to take part in the regular monthly inspection and make recommendations with regard to them (as noted by the Court of Appeals in its opinion (App. p. 9)). The "detailed tasks which could have been performed as well by the Railroad's employees if Irby had not been present" (App. pp. 9-10) all involved the routine work which he was performing on behalf of Westinghouse as part of the job of "follow". There was not a shred of evidence to justify any inference that the Railroad had taken over Westinghouse's employee and had directed him to do railroad work, separate and apart from the daily job which he was doing for Westinghouse. On the contrary, the evidence showed without contradiction that every job he performed was strictly within the scope of his Westinghouse employment.

The Court of Appeals lays stress on the fact that the work in which Irby was engaged immediately before his death was the stoning of a generator "albeit it was one which could have been performed by a Railroad electrician" (App. p. 10). The mere fact that the Railroad might have performed the entire job of servicing the locomotive through its own employees cannot serve as a basis for a finding that a master and servant relationship really existed between the Railroad and a Westinghouse employee. There was no possible basis for any suggestion that the job Irby performed was non-delegable Railroad work.

employment relationship between the railroad and the employee of the independent contractor.

Again and again that contention has been rejected by this Court and the other federal courts. Thus in *Robinson v. B. & O. R. Co.*, 237 U. S. 84 (1915) the Pullman porter, as previously noted, collected railroad tickets. In *Dougall v. Spokane, P. & S. Ry.*, 207 F.2d 843 (9th Cir. 1953) the contractor was maintaining the right of way. In *Del Vecchio v. P. R. R.*, 233 F.2d 2 (3d Cir.), cert. den. 352 U. S. 909 (1956), the coal loading by the contractor was part of the transportation contract. In each of those cases, much more than in the case at bar, it could have been argued, as Chief Judge Biggs suggested (App. p. 13), that the Railroad "made use of the employee, had him "do its work" and exercised the "right to control".

Of course, a railroad company always has the ultimate control over all activities on its equipment or right of way and, as pointed out in the record in the case at bar, if an employee of the independent contractor should get drunk or disorderly, it would always have the right to order him off its equipment (327a). It may direct a contractor where and when to load coal as in *Chicago, R. I. & P. R. R. Co. v. Bond* and *Del Vecchio v. P. R. R.*, *supra*, pp. 14, 15, but that has never been declared the type of control which creates a master and servant relationship. The test of control has always been considered to embrace the employer's control over the details of the method of performing the work, not the mere control of the time and place of its performance. *Restatement of the Law of Agency*, § 220. Similarly, the mere fact that the contractor is performing work on behalf of the railroad company or the fact that such work could be characterized as "regular railroad maintenance work" has never been considered sufficient to satisfy the test of "whose work is being done". If the interpretation which the court below has placed upon the phrase is a valid one, obviously every employee of an independent contractor will be found to be within the FELA, for in that

loose sense all of them will be found, just as Irby was found, to be performing railroad work.[16]

16: Several other factors on which the Court of Appeals apparently relied in connection with the character of Irby's work may be briefly mentioned:

It noted (App. p. 9) that for a period of fourteen months Irby worked exclusively on the Railroad's equipment. However, it recognized that with expensive intricate machinery "the follow-up period is of necessity lengthy . . ." (App. p. 13) and was intended to continue until the equipment was in satisfactory working condition (App. p. 12).

It pointed out that Irby took part in regular monthly inspections of the locomotive for the Railroad and made recommendations in respect to them as well as recommendations at other times for work to be done on the locomotive (App. p. 9). The record showed without contradiction, however, that he did not participate with the Railroad employees who were engaged in the inspection nor join in their report (81a, 112a, 223a, 328a; App. p. 11) but made his own inspection on behalf of his employer, Westinghouse, as a part of his job of "follow" for it (104a, 186a-187a, 220a).

The fact that Irby was on call 24 hours a day and responded immediately to a Railroad call in the event of a breakdown (App. p. 10) was of no significance, for as Westinghouse's repairman, it was part of his job to do just that. The assignment of Railroad employees to assist him and the fact that they took orders from him (App. p. 20) are equally without significance. As noted in the quotation from *Standard Oil Company v. Anderson*, 212 U. S. 215, 221-222 (1909), cited by the Court of Appeals at App. pp. 14-15:

> "Here, we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."

There will not be found in the opinions of either of the lower courts any pretence that the Railroad had "authoritative direction and control" over Irby's work with the exception of the bald statement of the Court of Appeals (App. p. 11):

> "The Railroad also had the right to tell Irby what he should do or should not do in respect to the locomotives"

This "right to tell him" went no further than that of any other owner who can call a repairman on or off his premises.

Point IV.

There Was No Justification for the Lower Courts to Set Aside or Ignore the Normal Concommitants of the Independent Contractor Relationships.

The opinion of the court below recognized as one of "the facts of business life" that Westinghouse Manufacturing Company was obliged to supply its own employee, Irby, to "follow" the locomotive on its behalf (App. p. 13). The record also showed without contradiction that both the Railroad and Westinghouse at all times intended Irby to be and to remain solely a Westinghouse employee,[17] even though the Railroad incidentally received benefit from his services. In permitting the jury to find that Irby was an employee of the Railroad, the Court has destroyed the basic relationship of the parties as they themselves created and intended it, has permitted employment to be imposed upon the Railroad contrary to its will (and the will of Westinghouse as well) and in consequence has made it impossible for business concerns to preserve a relationship theretofore considered both lawful and desirable.

In thus ignoring what Judge Biggs himself referred to as "the facts of business life" in order to achieve what the court may have considered a socially desirable result,[18] the court has in fact handed down an unjust and economically unwise decision. In such situations as the one in the case

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[17] The Court of Appeals specifically recognized that

"During the entire period that Irby was working on the locomotives, he was deemed by Westinghouse officials to be engaged in following up the operation of the locomotives and considered to be doing so for the benefit of Westinghouse" (App. p. 12).

[18] The social policy fostered by this decision, that [illegible] recovery of one quarter of a million dollars in damages from a fictional "employer" by an employee's estate which lets already received statutory and contractual death benefits in excess of $40,000 (30 308a) from his actual employer, is equally indefensible on legal [illegible] sociological theory.

at bar, the employment status is created by laymen. No layman could possibly understand employment relationships which were based upon the doctrine of the decision in the court below.

Traditionally railroad companies throughout the country have utilized the services of independent contractors in connection with all kinds of specialized work. Carpenters, track layers, bridge builders, car repairers and electrical engineering firms are examples, to name only a few.

The reasons for the use of such contracting firms are largely economic. In many instances, of which the case at bar furnished a clear example, a railroad company will not have the trained personnel to perform the work. In others, the job to be performed may be of a temporary nature and the railroad will not want to increase its working force only to face the necessity of laying off the new employees in a relatively short period of time. Use of the railroad's own employees may pose questions of efficiency and economy.

It is axiomatic that the independent contractor concept precludes a finding of dual employment by both the railroad and the contractor. The absence of the employment relationship as between the employee and the railroad may well be an extremely important factor in the determination to employ a contracting firm to perform the work. Since the railroad will neither select the contractor's employees nor supervise the details of their work, it is not surprising that the carriers do not intend to make the contractor's employees their own and do not desire to subject themselves to the extensive liability which is imposed upon them in the case of their own employees under the FELA. Prior to the decision in the case at bar it was believed to be entirely lawful for a railroad to make use of the services of an independent contractor without the incurring of consequences which would be expected if the railroad had chosen to perform the work by use of its own employees.

The effect of the decision is to destroy the independent contractor relationship and in consequence it will put to an end a long standing and widespread business practice in the railroad industry.[19] It imposes upon the parties a purely fictional relationship, contrary to their own intention and completely inconsistent with the existence of an independent contractor relationship. Under such circumstances, railroads will no longer be willing to use the services of contractors since they have no control over the selection of the contractors' employees or their work performance. If everyone who works on the railroad is to be considered a railroad employee, the carriers will insist upon having all railroad work done by employees whom they select and supervise. It is obvious that the effect of such a change, which would be necessitated because of the decision of the lower court rather than by the desires of the carriers or any principle of efficiency or economy, would cause great hardship among many thousands of business concerns closely affiliated with the railroad industry.

CONCLUSION.

We urge three principal reasons why certiorari should be granted in this case.

First, the decision of the court below broadens the scope of the FELA far beyond the contemplation of Congress as interpreted by this Court and other federal courts over a period of fifty years. Though the Court of Appeals acknowledged the limitations of the doctrine of *Robinson v. Baltimore & Ohio R. R.*, 237 U. S. 84, 94 (1915), (App. p. 15), its decision effectively defied them.

19. Also, the decision below will create considerable confusion with respect to presently existing contracts between railroads and independent contractors because it will substantially change the basic relationship of the parties to those contracts which are in the course of being performed and where performance will continue far into the future.

Secondly, this case presents a question of vital importance to every railroad in the country and one involving nothing less than whether they may be able to continue to operate substantial portions of their overall activities through the utilization of the services of independent contractors as in the past. Obviously, that question has equal importance to the myriad number of contracting firms who perform all kind of specialized work for the railroad industry. The court below has indicated by its decision in this case that merely on the basis of the contractor's performing railroad work, the employee of an independent contractor may be found to be the railroad's employee at the very same time. Such a ruling destroys the independent contractor concept and poses a question as to whether the business of many contractors who are connected with the railroad industry will be able to survive.

Finally, this Court should now resolve the serious doubt which has been created by the decision below and by a series of recent decisions of this Court which have tended to expand the coverage of the FELA and which, at the very least, have created uncertainty as to whether the employees of independent contractors are entitled to the benefits of that Act. In *Southern Pacific Ry. Co. v. Gileo*, 351 U. S. 493 (1956), the Court allowed recovery by employees who were engaged in new construction. In *Reed v. Pennsylvania R. Co.*, 351 U. S. 502 (1956) the benefits of the Act were granted to employees who were not engaged in transportation. In *Sinkler v. Missouri Pacific*, 356 U. S. 326 (1958) the Court permitted recovery against a carrier whose employee was injured by an independent contractor. And in *Baker v. Texas & Pacific R. Co.*, certiorari granted November 10, 1958, 358 U. S. 878, the Court has presently before it a case which involves FELA liability of a carrier to the employee of an independent contractor. While the decision in the *Baker* case may turn either on whether the contractor was in fact independent or on a procedural question, the case

at bar squarely presents the important issue as to whether an employee of an independent contractor is entitled to recover under the FELA merely by reason of the fact that while in the employ of the contractor he was engaged in the performance of railroad work. That question is of such vital consequence to the railroad industry as well as to all the contractors who serve it, that certiorari should be granted in this case also so that the issue may be resolved with finality at this time.

Respectfully submitted,

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Appendix.

OPINION OF USDC ED PA. SUR DEFENDANT'S MOTION FOR JUDGMENT OR FOR A NEW TRIAL.

Before KIRKPATRICK, *Ch. J.*

This is an action by the administratrix of Joe G. Irby to recover damages for his death. A critical issue in the case was whether at the time he was killed Irby was an employee of the Pennsylvania Railroad, so as to bring the case under the Federal Employers' Liability Act. A separate trial of that issue was had and the jury, answering a written interrogatory, found that he was. The remaining issues were then tried and the jury found upon sufficient evidence that Irby's death was caused by the negligence of the defendant, and awarded damages in the amount of $250,000.

The defendant now moves for judgment under Rule 50 and in the alternative for a new trial. The defendant concedes that if the jury's finding that Irby was in its employ at the time of his death was proper, the evidence of negligence and damages was sufficient to support the verdict upon these issues. In that event, it contends that a new trial should be ordered on account of various trial errors.

Irby, a graduate electrical engineer, had been employed by Westinghouse Electric Corporation for a number of years. At the time of his death and for some fourteen months prior thereto he had been working continuously, full time and overtime, on equipment belonging to the Pennsylvania Railroad at its Wilmington shops and on the road. It should be noted, however, that this is not the usual "loaned-servant" type of case, in which the employee temporarily passes completely out of the service of one

employer into that of another. The plaintiff in this case does not dispute that Irby was at all relevant times in the employ of Westinghouse, but contends that he was also doing work for the Railroad and was in its employ, as well as that of Westinghouse, when he was killed, and the issue was submitted to the jury on the theory of dual employment.*

The principle is well established and was stated by the Court of Appeals for this Circuit in Dickerson v. American Sugar Refining Co., 211 F. 2d 200, 203, as follows: ". . . a person may be the servant of two masters, not joint employers, at the same time as to the same act, provided that service to one does not involve an abandonment of service to the other. Such is the case where the employee is transferred to carry on work which is of mutual interest to both of two employers and to effect their common purpose."

The courts have pointed out a large number of factors, all of which are proper for consideration in making the ultimate inference as to who a man's employer is. The defendant stresses control of the work and the manner of doing it as the all-important test, and this view is not without support in the language of some opinions of the courts of Pennsylvania and other states. However, upon the question of employment, in cases arising under the Federal Employers' Liability Act, federal, not state, decisions govern.

The question of control of the details of an employee's work is, of course, a very important one, and in Shaw v. Monessen Southwestern Ry. Co., 200 F. 2d 841, Judge Goodrich suggested that perhaps it was the strongest consideration of all. But it is perfectly clear that Judge Goodrich did not mean that it was the sole and conclusive test of the relationship, and I find no decision of the federal courts which so holds.

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* The defendant offered a great amount of evidence showing that Irby was hired by Westinghouse, was paid by it, made reports to it, and was a beneficiary of its insurance and compensation plans, most of which evidence went no further than to establish the admitted fact that Irby was in the general employ of Westinghouse.

The general rule is that "ordinarily no one feature of the relationship of employer and employee is determinative", De Maree v. Pennsylvania Railroad Company, 147 F. Supp. 656. Thus in the Shaw case, supra, Judge Goodrich pointed out in a footnote that "Whose work is being done seems to have been the most important factor in Supreme Court decisions in somewhat similar cases", citing Linstead v. Chesapeake & Ohio Ry. Co., 276 U. S. 28, and Hull v. Philadelphia & Reading Ry. Co., 252 U. S. 475. In the Linstead case, the question being which of two railroads was liable for an injury to a conductor, the Court said, "Now the work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway . . ." and the Court distinguished the case from the earlier Hull case entirely upon the answer to the question, Which company's work was being done? Commenting upon the Hull and Linstead cases, the Court, in Robertson v. Yazoo & M. V. R. Co., 152 F. 2d 31, pointed this out, saying "In Hull's case and in Linstead's case, both cases where a general servant of a particular employer claimed that he had become the special servant of another, the evidence was searched out to discover whose work the servant was doing, and the rule was applied accordingly." In the Robertson case the Court held that the plaintiff was not an employee of the defendant "because the evidence not only fails to show that at the time of his injury he was doing the work of the defendant, but, on the contrary, affirmatively shows that he was not."* The power of control of the manner in which the work is performed bears upon the ultimate question of whose work is being done and is frequently determinative of it, but there are usually a number of other factors, all of which must be considered.

Possibly, what might appear to be a conflict of authority can be accounted for if one takes into consideration what

* See also Atlantic Coast Line R. R. Co. v. Tredway, 120 Va. 735, 93 S. E. 560 (a F. E. L. A. case) and Jones v. George E. Getty Oil Co., 92 F. 2d 255.

kind of liability the relationship may impose upon an alleged employer. Where the question is which of two employers shall be responsible for some carelessness in doing his work on the part of the employee, which injures a third person, it would seem logical enough to make the right to control the manner in which the employee does the work a major consideration among the various factors to be considered. On the other hand, where the principle of respondeat superior is not involved, the question being, who shall bear the economic loss arising from an injury to or death of the employee, it would be consistent with social and economic policy to give a larger measure of weight to the question, in the course of whose work was the loss incurred.*

In the present case, Westinghouse had sold and delivered to the Railroad Company, more than a year before Irby's death, two electric locomotives provided with certain electrical installations of an entirely new type. Irby's job at Wilmington was concerned with this equipment. Their performance had not been all that might be desired and Irby was engaged in ironing out difficulties and dealing with breakdowns so that the locomotives would operate satisfactorily in regular service. His job was described by the defendant's assistant shop foreman as being to keep the locomotives moving and to keep them in condition. It also included instructing railroad employees in how to maintain the locomotives and training them in their operation and use.

Westinghouse's business was making and selling locomotives. To the extent that Irby's work would go to make a satisfied customer of the Pennsylvania Railroad, what he was doing was part of Westinghouse's business. On the other hand, the business of the Railroad Company was operating trains and, to the extent that Irby was taking

* It may be noted that the discussion in the Restatement of Agency at Sections 219 and 220 is concerned almost exclusively with the question of liability to third persons for the alleged servant's tort

care of the locomotive he was hired to make the trains run and was doing the work of the railroad. If he had been merely demonstrating the locomotives in order to promote a sale, there might have been some ground for the argument that what he was doing was solely the business of Westinghouse, but the sale had been made and the Railroad had owned the locomotives for more than a year. There was nothing in the contract of sale which required Westinghouse to send an expert to follow up the performance of the equipment, and what Irby was doing when he was killed was not in the carrying out of any other obligation which Westinghouse owed. Its warranty of the locomotives had expired and, so far as it was concerned, it was merely a question of maintaining goodwill, and improving its own knowledge of the new equipment.*

As has been pointed out, Irby had been with the Railroad for a period of 14 months. Of course, as to the details of those portions of his work which required the highly expert skill of a trained electrical engineer, one would not expect the Railroad to exercise control in the sense of telling him how to go about the details of his work on this or that piece of electrical equipment. As a practical matter, the same applies to Westinghouse. Few employers would be guilty of the folly of interfering with the work of an expert, be he an electrical engineer, a toolmaker or a nuclear physicist.

Inasmuch as Irby was not at Wilmington by virtue of any contract between the Railroad and Westinghouse, the Railroad had the right to direct what he should or should not do with its equipment. Of course, the Railroad could not "fire" him from his employment with Westinghouse, but it could, without consulting Westinghouse "fire" him from his job with the Railroad on the locomotives if he did

* The warranty on the novel installation, called the "ignitron" had not expired, but Irby was taking care of the whole locomotive and, at the time of his death, was not working on the "ignitron" or anything connected with it.

not do the work it wanted done or did not do it in the way it wanted him to.

Not all the Irby work was of a highly expert nature. Some of the things which he did were routine work of the Railroad's regularly employed men who worked on electrical equipment.* As to these, as well as the specialized work which only he could do, the Railroad selected both the time and the place for the work to be done. It also appeared that Irby was "on call 24 hours a day and any time the train would break down someone from the railroad, wherever it would be, would call and tell him to come and report there." The railroad shop foreman denied that they ever gave Irby instructions as to what to do, but they would from time to time point out work to be done and, of course, he would be expected to do it.

Irby's work at times required him to ride with the trains in the cabs of the locomotives. When he did, he was under the control of the engineer and took orders from him. A locomotive engineer testified that he remembered only one occasion on which Irby rode with him and, on that occasion, performed various tasks, under his orders, which firemen or brakemen ordinarily performed, but the witness made it clear that the same condition would apply to any other time on which Irby may have ridden with him, and Mrs. Irby testified that he was frequently traveling on this locomotive which would take him away from home overnight several nights a week.

Irby was issued a pass on the Pennsylvania Railroad with the understanding that its use would be restricted solely to the business of the Pennsylvania Railroad Company. Such pass could lawfully have been issued under the Hepburn Act only to employees. 49 U. S. C., Sec. 1(7).

The fact that most, if not all, of the evidence offered by either party is uncontradicted does not remove a case

* As a matter of fact, the work which he was doing when he was killed was a routine job which railroad electricians could have done without difficulty.

from the province of the jury if "the evidence is such that fair-minded men may draw different inferences" from it. Lavender v. Kurn, 327 U. S. 645, 653. "It is further established that, when different inferences can reasonably be drawn from the testimony as to whether the lender or the borrower is the controlling master at the time of the accident, or whether both of them have the right of control, the question is one for the jury." Siidekum v. Animal Rescue League, 353 Pa. 408, 414. See also Restatement, Agency, Sec. 220(b).

In the present case the plaintiff was compelled to establish her case by the testimony of employees of the Railroad Company and of Westinghouse. ". . . where . . . there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." Lavender v. Kurn, supra. I would not go so far as to say that these witnesses were hostile, but it was quite evident that several of them were thoroughly enlisted in the cause of their employer and the jury would have been justified in discarding at least some of their testimony.

I am of the opinion that the jury's verdict was supported by sufficient evidence and that the defendant's motion for judgment must be denied.

It having been decided that Irby was employed by the defendant at the time of his death, the various questions raised by the defendant under the Delaware law, which would apply if he were not, drop out and need not be considered.

I find no merit in the reasons assigned by the defendant in its motion for a new trial.

An order may be submitted denying both of the defendant's motions.

OPINION OF USCA (3).

(Filed December 16, 1958)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued July 7, 1958

Before BIGGS, *Chief Judge*, and MARIS and GOODRICH, *Circuit Judges*

By BIGGS, *Chief Judge*.

This suit, based first on the Federal Employers' Liability Act, 35 Stat. 65-66 (1908), as amended, 53 Stat. 1404-05 (1939), 45 U. S. C. §§ 51-60 (1952) and second on the Wrongful Death and Survival Statute of the State of Delaware, 10 Del. Code Ann. § 3704 (1953),[1] was brought by Irby's administratrix to recover damages for his death which occurred on January 7, 1953.

It is clear that at the time of his death Irby, an electrical engineer, thirty-two years old, was an employee of Westinghouse Electric Corporation. He was killed while working on one of four electric locomotives built by Westinghouse and purchased from Westinghouse by the defendant, the Penn-

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1. In view of the ground on which we dispose of the case at bar it is unnecessary to discuss any cause of action which may have arisen in favor of the administratrix under the law of Delaware.

The defendant, the Pennsylvania Railroad Company, concedes that there is sufficient evidence of negligence to take the case to the jury under the Federal Employers' Liability Act while denying that that evidence was sufficient under the law of Delaware. The court below correctly stated:

> "It having been decided that Irby was employed by the . . . [Railroad] at the time of his death, the various questions raised by the . . . [Railroad] under the Delaware law, which would apply if he were not, drop out and need not be considered

sylvania Railroad Company. The locomotive in which Irby was killed was in the car shops of the Railroad at Wilmington, Delaware. His death occurred shortly after he entered a switch compartment in the middle of the locomotive. Although it is not clear how the accident occurred, the jury found that Irby was killed both by electrocution and asphyxiation.[2]

The plaintiff administratrix alleges that Irby was an employee of the Railroad and asserts that therefore the Federal Employers' Liability Act is applicable. The operative facts which support the plaintiff's position are as follows:

The electric locomotives were the property of the Railroad, title to the locomotive upon which Irby was killed having passed to the Railroad November 7, 1951. Although the locomotives bore a general warranty, that warranty had expired November 7, 1952, two months before Irby's death. For the fourteen months prior to his death he had been engaged in the task of servicing, of "following-up", the locomotives, after their delivery to the Railroad. During this period he had worked exclusively on the Railroad's equipment.

Irby's work was directed to keeping the locomotives in running condition. While he was assigned to the locomotives, he took part in regular monthly inspections of them for the Railroad and made recommendations in respect to them. Also, irrespective of these inspections, from time to time he made recommendations for work to be done on the locomotives.

The work-sheets prepared by Irby and made by him for Westinghouse enumerated several detailed tasks which

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2. On October 30, 1947, Irby had executed a general release of liability to the Railroad when he was assigned by Westinghouse to work on certain railroad equipment which need not be particularized here. It is sufficient to state that the equipment to which he was assigned in 1947 did not include the locomotive in which Irby was killed and the release is immaterial. We deem it unnecessary to discuss it further.

could have been performed as well by the Railroad's employees if Irby had not been present. He often assisted and participated in the repair work himself. Immediately prior to his death he was engaged in the task of "stoning" a generator commutator, albeit it was one which could have been performed by a Railroad electrician. Irby was not working on an ignitron which was the distinguishing feature of the type of locomotive which he was following-up.

Irby rode the locomotives on regular runs. In one instance, on January 1, 1953, while Irby was riding in the cab of a locomotive, he acted as a fireman or a brakeman, calling out signals, and observing passing trains, under the supervision of the locomotive engineer.

Irby was on call 24 hours a day. If at any time one of the locomotives had a breakdown, someone from the Railroad would tell him to report at the scene of the breakdown. Irby immediately responded to these notifications. He reported, or at least announced his presence, to an assistant foreman, a Railroad employee in charge of locomotive maintenance at the Wilmington shops. Irby also would be advised from time to time by the foreman of the electric locomotive shop, another Railroad employee, when a defect appeared, and he was expected to take part in the repair work and did so. During the time that Irby worked on the locomotives, Railroad employees would be assigned to assist him and these employees took orders from Irby.

Irby was issued a pass on the Railroad with the understanding that its use would be restricted solely to the business of the Railroad. Such a pass could be issued lawfully only to employees of the Railroad or to certain other classes of persons in which Irby was not included. See the Hepburn Act, 34 Stat. 546 (1910), as amended 41 Stat. 475 (1920), 49 U. S. C. § 1(7) (1952).

3. "Stoning" in this case was required because mica was used to separate the copper segments of the generator commutator. The mica had become high causing the brush to lift off segments of the copper which in turn burned the commutator. Irby was cleaning out the mica between the segments on the commutator.

The Railroad also had the right to tell Irby what he should do or should not do in respect to the locomotives. There was no contract between Westinghouse and the Railroad insofar as Irby's services were concerned.

The operative facts most favorable to the position of the defendant Railroad that Irby was not its employee are as follows:

Irby was originally employed by Westinghouse and throughout the term of his work with the Railroad's locomotives was paid solely by Westinghouse. His very extensive overtime work[4] was authorized only by Westinghouse.

Irby was supervised by Westinghouse personnel and took work assignments from them, consulting three or four times a week with his immediate supervisor in the Westinghouse organization. The Westinghouse supervisor or supervisors would examine the equipment, including the locomotives, and would discuss with Irby the nature of the difficulties encountered and possible design changes which might obviate further difficulties.

Irby made regular work reports to Westinghouse. While he made recommendations to the Railroad concerning work to be done on monthly inspections, actual reports of these inspections were not made by him and he did not sign them.

The locomotives were of a new design featuring an ignitron tube, used in the conversion of alternating current to direct current. Although the general warranty on the locomotives had expired at the time of Irby's death, the warranty on the ignitron tubes extended for a thirty-six

4. Irby performed a very large amount of overtime work. It appears that he worked 40 hours a week in the course of his regular employment and that he performed 32 hours of overtime almost week in and week out. It is the contention of the Railroad that this raises an issue as to whether there could be "any time" for him to be an employee of the Railroad as well as an employee of Westinghouse. This argument is irrelevant because it cannot be contended effectively that Irby worked so many hours for Westinghouse and so many hours for the Railroad in an arbitrary division of several duties.

month period and was still in effect at the time of Irby's death.

It was the custom of Westinghouse to have its employees "follow-up" on equipment after its delivery to customers. During the entire period that Irby was working on the locomotives, he was deemed by Westinghouse officials to be engaged in following-up the operation of the locomotives and was considered to be doing so for the benefit of Westinghouse. The follow-up was to continue until the equipment was deemed to be in satisfactory operative condition.

The foreman of the Railroad car shops at Wilmington considered that a Westinghouse employee, Coleman, was Irby's supervisor.

While Irby rode the locomotives on regular runs he did so in order to check the electrical circuits and electrical equipment. The incident of January 1, 1953, in which Irby rode in the cab of a locomotive, and performed the services of a brakeman or fireman, was the only one of its kind which any witness could recall. Also, on that day, Irby was on a holiday as his service time report to Westinghouse revealed.

The job in which Irby was engaged immediately before his death was "stoning" a generator commutator as we have stated. This was done by him with the commutator in place in the locomotive. Irby apparently thought that he was able to do the job in this manner because of his expertness. If Irby had not done the "stoning", the generator would have had to have been removed from the locomotive, a difficult and time-consuming procedure.

The court below, because of the issues presented by the Delaware law, now obviated, divided the trial into two parts. The court first limited the jury to two issues: first, whether Irby was an employee of the Railroad and, second, whether he was actually engaged in or connected with the movement of a train, at the time of the accident. On interrogatories the jury found for the administratrix on both issues. The

court and the jury next heard evidence on the issues of negligence, causation and damages. The jury eventually returned a verdict for the plaintiff in the amount of $250,000 and judgment was entered thereon. The Railroad moved for judgment n.o.v. and, in the alternative for a new trial under Rule 50(b), Fed. R. Civ. Proc., 28 U. S. C. Both motions were denied. — Fed. Supp. —. The appeal followed.

The Railroad asserts in support of its motion for judgment n.o.v. that it was not proved that Irby was its employee and in its motion for a new trial, asserted that error was committed in the exclusion of evidence which, it says, tends to support its view that Irby was employed only by Westinghouse. There is, of course, no question but that Irby was an employee of Westinghouse. The issue is whether sufficient evidence was adduced to enable the jury to conclude that Irby was also an employee of the Railroad.

The facts of business life demonstrate that manufacturers or contractors such as Westinghouse require field representatives to follow-up on sales to assure the satisfaction of their customers and to foster and protect known and established reputations for quality. With expensive and intricate machinery such as electric locomotives, the follow-up period is of necessity lengthy and requires close cooperation with the purchaser of the equipment. The designation of a vendor's employee to work with the vended equipment on the vendee's premises does not necessarily establish an employment relationship between the vendee and the employee assigned by the vendor. On the other hand a vendee may not make use of that employee, having him "do its work" and exercising the "right to control" him, accompanied by other incidents usually connected with employment, and escape the responsibility imposed by the federal statute. The evidence as to Irby's employment looks two ways and it is impossible indeed to draw a line of demarcation between the work Irby performed for Westinghouse and that which he did for the Railroad. The

evidence would support the conclusion that he was, to some extent at least, a common employee of both.

This issue became one for the jury. As was said in the Restatement, Agency: "Where the inference is clear that there is, or is not, a master and servant relationship, it is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered."[5, 6] Cf. Southern Pac. Co. v. Libbey, 199 F. 2d 341, 343, 346 (9 Cir. 1952); Dougall v. Spokane P. & S. Ry. Co., 207 F. 2d 843, 846 (9 Cir. 1953), cert. denied 307 U. S. 904 (1954).

What are the applicable legal tests or standards? In the leading case of Standard Oil Co. v. Anderson, 212 U. S. 215, 221-222 (1909), the Supreme Court stated: "It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is re-

5. Restatement, Agency § 220, Comment *b* (1933).

6. Section 220(1) provides: "A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right of control." This test is reaffirmed in Restatement, Agency 2d § 220 (1958).

sponsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking." In Shaw v. Monessen Southwestern Ry. Co., 300 F. 2d 841 (3 Cir. 1953) at p. 843, we stated: "The question to be determined is: By whom is an individual employed at a particular time? The question often comes up in determining whether a given worker is a servant or an independent contractor. The authority to give detailed directions in the performance of a task is a highly important consideration." In the Shaw opinion at the page indicated we also said in footnote 4, cited to the text of that opinion: "Whose work is being done seems to have been the most important factor in Supreme Court decisions in somewhat similar cases", citing Linstead v. Chesapeake & Ohio Ry., 276 U. S. 28 (1928), and Hull v. Phila. & Reading Ry. Co., 252 U. S. 475 (1920).

The word "employee" as used in the Federal Employers' Liability Act [7] is employed in its natural sense and is intended to describe the conventional relation of an employee and employer. Robinson v. Baltimore & Ohio R. R., 237 U. S. 84, 94 (1915). While it is true that "[E]ach case must be decided on its peculiar facts . . .", Cimorelli v. New York Cent. R. R. Co., 148 F. 2d 575, 577 (6 Cir. 1945), the test of who has the "right to control" the activities of the workman is the generally accepted criterion determining employment status. See Restatement, Agency § 220 (1933). The test was employed in Chicago, Rock

7. 45 U. S. C. §§ 51-55, 59-60 (1952). See also Hours of Service Act, 45 U. S. C. §§ 60-62 (1952), § 63 (Supp. 1958).

Island & Pac. Ry. v. Bond, 240 U. S. 449 (1916) and in Del Vecchio v. Pennsylvania R. R. Co., 233 F. 2d 2 (3 Cir.), cert. denied 352 U. S. 909 (1956), without reference to whose work was being done. But the "right to control" is a conclusion to be drawn from a consideration of all the relevant facts of the relationship between the worker and those whose work he does and, as is pointed out in both Standard Oil Co. v. Anderson and Linstead v. Chesapeake & Ohio Ry., *supra*, the question of "whose work is being done" is a factor which the jury must consider in determining the "right to control". We point out that the phrase "right to control" is not a single magical solvent for the "right to control" must be considered in the light of other incidents relating to the work performed. Thus the status of employment is established. See Restatement, Agency § 200, Comment *b* (1933).

As we have indicated there is evidence which, if believed by the jury—and it must be assumed here that it was believed—clearly establishes that at times during the fourteen months Irby was engaged in activities for the Railroad; and that he was called on to do so by supervisory employees of that company in connection with the locomotives sold by Westinghouse. As has been said, immediately preceding his death he was engaged in work on an electric locomotive owned by the Railroad and used by it in interstate commerce. The repairs which he was engaged in making were necessary for the maintenance of the Railroad's services.

The jury was entitled to find the foregoing as facts and to conclude that the Railroad had a right of control over Irby and that he was engaged in maintaining its services, *i.e.* doing its work. Cf. Reed v. Pennsylvania R. R. Co., 351 U. S. 502 (1956). The jury was entitled to reconcile the operative facts if it could do so, and attribute such weight as it desired to particular incidents and to find under a proper charge that Irby was an employee

of the Railroad. Ellis v. Union Pac. R.R. Co., 329 U.S. 649 (1947); Lavender v. Kurn, 327 U.S. 645 (1946).

It is clear that the court below did not err in submitting the issue of whether Irby was employed by the Railroad to the jury. The question for our determination is therefore whether the charge was an adequate one. The Railroad contends that the trial judge was unwilling "to give weight to the test of 'power of control'" and apparently believed that "whose work was being done" was the "real criterion of employment" in this case. We cannot agree for we are of the opinion that the court's charge was adequate, properly stating the principles of law whereby employment must be determined. The court read to the jury, after sufficient explanation, the last two sentences of that portion of the opinion of the Supreme Court in Standard Oil Co. v. Anderson which we have quoted *supra* and also read that portion of the opinion of this court in Shaw v. Monessen, hereinbefore quoted, including footnote 4 cited to the text in that opinion. While the statement in footnote 4 of the opinion in Shaw v. Monessen, *viz.*, "Whose work is being done seems to have been the most important factor in Supreme Court decisions in somewhat similar cases," may seem somewhat inconsistent with our present ruling, that inconsistency is more apparent than real for the issue was not in focus in Shaw v. Monessen for the reasons set out in our footnote below.[8] We point out that the trial

8. It should be noted that the Shaw case was tried to the court, without a jury. Moreover, the issue, presented by stipulation, was whether Shaw was engaged in interstate commerce while working for the Monessen Southwestern Railway Company, a common carrier, "or" was engaged as an employee of the Pittsburgh Steel Company. There was no contention that he was an employee of both and the issue of common employment was not presented to the court.

The Linstead case also did not present the issue before us in the case at bar. Mr. Chief Justice Taft stated, 276 U. S. at p. 30: "The question in the case is, for whom he [Linstead] was working when he was killed, whether for the Chesapeake & Ohio Railway Company, the respondent, *or* the Big Four Company." (Emphasis added).

In Standard Oil Company v. Anderson a similar "either-or" issue was presented.

court in the case at bar went on to state succinctly and positively to the jury: "The ultimate question is who could control the manner of the employees doing the work; who had the right to control, not who actually did. Who had the right to control it?" Moreover, at the close of the charge, the court reiterated, at the request of the Railroad, its ninth request for a charge as to the "right of control," quoting it verbatim as follows: "'One important test in determining the employment of Irby is who had the right of control,' as I have told you."

On balance the charge of the court below must be deemed to be sufficient and correct. It is our opinion that the court below charged adequately in respect to all the pertinent factors involved in this aspect of the case and stated the applicable law without substantial error. But even if we were to assume *arguendo* that the charge was erroneous no cogent objection was made to it by the Railroad as required by Rule 51, Fed. R. Civ. Proc., 28 U.S.C. We therefore could not set aside the verdict for, in any event, we could not deem the charge to have been so fundamentally unfair as to have resulted in a gross miscarriage of justice. United States v. Atkinson, 297 U.S. 157 (1935); Palmer v. Hoffman, 318 U.S. 109 (1943). See also Callwood v. Callwood, 233 F.2d 784 (3 Cir. 1956).

Another point raised by the Railroad requires discussion. The railroad asserts that the court below erred in excluding evidence which it offered on the issue of Irby's employment, and seeks a new trial. The Railroad sought to introduce the following evidence: inter-office letters from the files of Westinghouse dealing with the length of time during which "follow-up" on the locomotive was to continue; testimony by its Middle Atlantic Region Service Manager relating to the amount of Irby's overtime and the concern of Westinghouse in respect to the amount of it, testimony by the Engineering and Service Manager of the Atlantic Region of Westinghouse relating

to receipt by Irby's widow of proceeds of group life insurance policies carried by Westinghouse in the amount of $2,500, compensation payments in the amount of $10,514.20 to be collected by her, and certain gratuities which she received from Westinghouse following Irby's death. The trial court rejected these offers on the ground that such evidence would be merely cumulative and that its possible prejudicial effect might outweigh its probative value.

Reviewing these offers we cannot say that the trial court committed error in excluding the proffered evidence. Burgman v. United States, 188 F.2d 637, 641-42 (D.C. Cir.) cert. denied, 342 U.S. 838 (1951). At best its effect would have been only cumulative and we think that the instant case cannot be decided by the bulk of evidence on the respective sides of theoretical scales.

Other issues raised by the parties do not require discussion.

The judgment of the court below will be affirmed.

JUDGMENT OF USCA (3).

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Present: Biggs, *Chief Judge*, and Maris and Goodrich, *Circuit Judges*.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Ida O. Creskoff,
Clerk.

December 16, 1958.

ORDER OF USCA (3) CORRECTING OPINION.

Present: Biggs, *Chief Judge*, and Maris and Goodrich, *Circuit Judges*.

And Now, to wit, this 9th day of January, 1959, it is

Ordered that the first two complete sentences beginning on page 4, lines 1 to 5, inclusive, of the opinion filed herein on December 16, 1958, as follows: "Such a pass could be issued lawfully only to employees of the Railroad or to certain other classes of persons in which Irby was not included. See the Hepburn Act, 34 Stat. 546 (1910), as amended 41 Stat. 475 (1920), 49 U.S.C. §1(7) (1952)." be and the same hereby are stricken from the opinion.

By THE COURT,

Biggs,
Chief Judge.

ORDER OF USCA (3) SUR PETITION FOR REHEARING.

Present: Biggs, *Chief Judge*, and Maris and Goodrich, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT,

Biggs,
Ch. J.

Dated: January 9, 1959.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 729.

ELISABETH BYRNE, ADMINISTRATRIX OF THE ESTATE OF JOE G. IRBY, DECEASED,

Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTION PRESENTED.

Should this Court grant certiorari to consider the narrow question of the legal sufficiency of evidence of employment under the Federal Employers' Liability Act, where that question was resolved against petitioner by the trial court; a jury found adversely to petitioner on a special interrogatory specifically addressed to the issue of employment after a charge to which petitioner took no cogent objection; the trial court again rejected petitioner's contention on post-trial motions; and the Court of Appeals for the Third Circuit unanimously affirmed the legal sufficiency of the evidence and again rejected petitioner's contention in its denial of petitioner's application for a rehearing on that simple issue?

STATUTE INVOLVED.

The Federal Employers' Liability Act, 45 U. S. C. section 51, provides as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

This is an action to recover damages for the wrongful death of respondent's decedent, Joe G. Irby. The jury answered numerous special interrogatories but the answer to only one is pertinent in this proceeding. That interrogatory was "Was Mr. Irby at the time of the accident an employee of the Pennsylvania Railroad Company?" (364a). The jury answered this interrogatory: "Yes" (364a).

Respondent was obliged to prove her case by the testimony of reluctant witnesses who were conservatively characterized by Chief Judge Kirkpatrick as witnesses who were ". . . thoroughly enlisted in the cause of their employer . . ."[1] Despite this obvious handicap, but with the aid of numerous depositions and the timely and pointed questions of the Chief Judge, the respondent produced the following strong evidence of decedent's status in order to show that he was an employee of both Westinghouse and the Pennsylvania Railroad.

Irby was an electrical engineer (52a). He had originally been employed by Westinghouse Electric Company and his job was to work on two locomotives which Westinghouse sold to the Pennsylvania Railroad. Title had passed to it on November 7, 1951 (117a, 174a). Under the contract of sale, Westinghouse warranted the satisfaction of the locomotive to petitioner for a period of one year, the expiration of which was November 7, 1952 (120a). (In his opening address, counsel for petitioner inaccurately advised the jury that the warranty period was 18 months [42a].) Thereafter, Irby was killed on January 7, 1953. These were so-called "rectifier locomotives" which differed from other electric locomotives in that they had an "ignitron"—an electrical device—in their power system.

As witness Shinn, petitioner's assistant foreman in charge of maintenance, testified, Irby's full-time job was to

1. Petition, Appendix, p. 7.

see to it that these engines were kept moving and in operating condition in regular Pennsylvania Railroad service (67a). The decedent was at *all* times working exclusively on these Pennsylvania Railroad engines and *only* on Pennsylvania Railroad premises and lines (259a-260a). Aside from paying decedent (our contradictory proof of which was, we believe, erroneously held to be insufficient [122a-125a, 359a]) Westinghouse's only connection with Irby was that after his work was done he would send reports concerning the operation of the engine to Westinghouse (126).

On the other hand, the evidence showed that Irby routinely did a great deal of conventional railroad maintenance and repair work for the petitioner and that he was in constant contact with petitioner's maintenance men, supervisors and engineers (244a). The jobs that Irby did were regular normal tasks which would have been done in his absence by the Railroad employees (244a). All of Irby's work was done on premises and equipment owned by the petitioner (69a, 70a, 86a, 259a-260a). In order to make repairs Irby had available petitioner's usual MP62 reports which contained information as to what was wrong with the locomotive (66a). These reports were prepared by petitioner's enginemen and were required by I. C. C. regulations (65a).

Irby had been working on these locomotives exclusively for fourteen continuous months prior to the accident (164a). During the course of that unbroken fourteen month period he rode solely on petitioner's engines and solely over its railroad system (163a). When he rode on petitioner's engine he performed actual and conventional everyday railroading operational tasks, all of which were totally foreign and alien to any conceivable Westinghouse operation. He would call out signals, observe passing trains and would look out for any objects protruding from the side of those passing trains to protect petitioner's rolling stock (142a). He was then under the supervision of the train engineman who gave him orders (142a).

Irby had a pass to ride on all Pennsylvania Railroad equipment. As a precondition to the issuance of this pass, petitioner expressly insisted that the use of the pass ". . . will be restricted solely to the business of the Pennsylvania Railroad Company . . ." (870a). He was actually allowed to ride on other Pennsylvania Railroad trains (261a). When Irby was not riding on the trains he was fixing various equipment on the locomotives which included not only the electrical equipment peculiar to these locomotives (for which he had special training), but also all other usual equipment normally found on all electric locomotives in the Pennsylvania Railroad system (D26—offered in evidence 348a). The only electrical equipment peculiar to these locomotives was an ignitron (113a).

Irby was subject to telephone calls at home from the Pennsylvania Railroad Company's supervisory employees who would direct him to go to different places to meet the locomotive and perform work on it (151a). In addition, it is conceded that the decedent did instruct and train the regular Pennsylvania Railroad Company employees in the intricacies of the locomotive and tell them how to maintain it, how to take care of it, and to give advice and guidance in respect to its operation and use (76a).

If the Railroad desired to keep the locomotive in service, it could and did tell Irby not to work on it (332a), and when there was something which was not an emergency, the Railroad would tell Irby to wait until the monthly inspection period (326a-327a). Marsh, a Railroad superintendent of equipment, testified that if there was a locomotive defect, Irby would let the supervisor for the Railroad know ". . . and we [the Railroad] would decide what would be done" (325a).

The decedent usually reported to the aforementioned Railroad Company boss Shinn when he came to work (72a) and told Shinn when he was leaving (73a). If the decedent found anything wrong with a locomotive during the monthly inspection, he would tell the Railroad people about it and they would include it in their monthly inspection report

(81a). The Railroad is required by law to make this report (51a). During all of the time that Irby worked on these engines he would be assigned Railroad men by the Railroad foremen to help with the work (76a). In fact, sometimes even if there were no spare men, Irby would be assigned a man anyway (76a). These men took orders from Irby (111a). The Railroad witness Trowill admitted that Irby's services were of great benefit to the Railroad (91a). Irby was under the direct and specific control of and took orders from the Railroad supervisor (96a).

At the time of the accident and for a period of a couple of days prior thereto, the locomotive involved was in the Wilmington yard for a monthly inspection (52a). Shortly before the accident the decedent was engaged in undercutting or stoning a commutator (83a). The job was one that any ordinary railroad electrician could have done and normally does (90a). Irby had been assigned a regular company employee to assist him in this job (85a). He was not engaged in working on the ignitron at the time of the accident and the ignitron in no way contributed to the accident (113a, 114a).

Under all of this evidence the trial judge in a charge to which ". . . no cogent objection was made . . ."[2] by petitioner permitted the jury to find that Irby was the dual employee of both Westinghouse and the Pennsylvania Railroad. After the jury verdict the Chief Judge denied defendant's motion for a directed verdict or a new trial.

After a careful review of the evidence, the Court of Appeals for the Third Circuit, in a unanimous opinion written by Chief Judge Biggs and joined in by Judges Maris and Goodrich, held that the evidence was legally sufficient on the issue of employment and thereafter that same court rejected petitioner's application for a rehearing on that issue. This Petition followed.

2. *Id.*, Appendix, p. 18.

ARGUMENT.

Introduction.

The instant Petition is nothing more than an effort to extract from this case a supposed conflict with applicable law and an imagined disturbance of a long-standing commercial practice in railroads' use of independent contractors. In fact, there is neither such conflict nor disturbance. What does genuinely exist—and it has always been the only issue in the case—is what was unanimously described with exactitude by the Court of Appeals below as follows:

> "The issue is whether sufficient evidence was adduced to enable the jury to conclude that Irby was also an employee of the Railroad."[3]

This issue was resolved in respondent's favor by Chief Judge Kirkpatrick at the trial of the case where, on a special interrogatory addressed specifically to the question of employment, a jury expressly found as a fact decedent's employment with petitioner after a charge to which petitioner took no cogent objection (364a). Chief Judge Kirkpatrick thereafter reiterated the sufficiency of the evidence in his opinion denying petitioner's motion for judgment n. o. v. This holding was unanimously affirmed by the Court of Appeals for the Third Circuit. Both courts followed the letter and spirit of this Court's previous holdings as to the applicable tests to be applied.

In the following argument we shall, first, prove the fiction of petitioner's representations that a conflict exists and that such conflict, if not resolved by this Court will disrupt railroads' use of independent contractors. Second, notwithstanding the extremely careful and repeated lower court reviews of the evidence, petitioner has unfortunately

3. Per Chief Judge Biggs, *Id.*, Appendix, p. 13.

seen fit to attempt yet another review of that same evidence here. Since petitioner has seriously erred in its representations to this Court of the evidence we shall demonstrate the gross inaccuracies of those representations.

I.

The Decision Below Resulted From the Exact and Absolutely Consistent Application of Settled Rules of Law and Therefore It Creates Neither Conflict in the Law Nor Any Interference With Railroads' Utilization of Independent Contractors.

In *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 35 S. Ct. 491 (1915), this Court held that the word "employee" as used in the Federal Employers' Liability Act is employed in its natural sense and is intended to describe the conventional relationship of employer and employee. Petitioner makes the blunt assertion that the decision of the court below is in conflict with *Robinson* ". . . and the numerous federal decisions following that case."[4]

The decisional law flowing from *Robinson* developed controlling standards which for years have very clearly taught what the conventional usage of the word "employee" means. The conduct of petitioner throughout this entire litigation has been to resist these clear teachings with a blind insistence that those post-*Robinson* cases do not say what in truth they do say. It has done so by repeatedly claiming that there is only one determinant of employment—control.

Both courts below have destroyed that argument by conclusive analysis and citation to the authorities. Thus, having been shown to be incorrect on the applicable tests controlling this problem, the petitioner should have been expected candidly to acknowledge that when Chief Judge Biggs wrote as follows for the court below, he was simply

4. *Id.*, p. 9.

reiterating the applicable tests for determining the conventional meaning of employment:

> "The word 'employee' as used in the Federal Employers' Liability Act [footnote] is employed in its natural sense and is intended to describe the conventional relation of an employee and employer. Robinson v. Baltimore & Ohio R. R., 237 U. S. 84, 94 (1915). While it is true that '[E]ach case must be decided on its peculiar facts . . .', Cimorelli v. New York Cent. R. R. Co., 148 F. 2d 575, 577 (6 Cir. 1945), the test of who has the 'right to control' the activities of the workman is the generally accepted criterion determining employment status. See Restatement, Agency § 220 (1933). The test was employed in Chicago, Rock Island & Pac. Ry. v. Boyd, 240 U. S. 449 (1916) and in DelVecchio v. Pennsylvania R. R. Co., 233 F. 2d 2 (3 Cir.), cert. denied 352 U. S. 909 (1956), without reference to whose work was being done. But the 'right to control' is a conclusion to be drawn from a consideration of all the relevant facts of the relationship between the worker and those whose work he does and, as is pointed out in both Standard Oil Co. v. Anderson and Linstead v. Chesapeake & Ohio Ry., *supra*, the question of 'whose work is being done' is a factor which the jury must consider in determining the 'right to control'. We point out that the phrase 'right to control' is not a single magical solvent for the 'right to control' must be considered in the light of other incidents relating to the work performed. Thus the status of employment is established. See Restatement, Agency § 200, Comment b (1933)."[5]

5. *Id.*, Appendix, pp. 15-16. The above citation to § 200 of the Restatement of Agency is, we believe, an inadvertent typographical error in the official printed opinion of the Court of Appeals. It should read § 220. We are taking the necessary steps to have the error officially corrected and will so advise this Court when that is accomplished.

All that remained to be done has been fairly done: the courts below have decided that there was, as a matter of law, sufficient evidence of employment within *Robinson* terms for submission to a jury, and a jury fairly decided the issue after a charge that accurately instructed in *Robinson* terms. But instead of being candid about this, petitioner now attempts to transmute that authoritatively settled issue into a different one remarkable both for its unrelenting ingenuity and complete lack of relationship with anything that is connected to the relevant law.

The new argument now presented for the first time in the entire litigation is to the effect that since decedent was admittedly at least Westinghouse's employee, it is legally impossible that he could have also been petitioner's employee. In order to demonstrate this petitioner urges, *as a matter of law*, that since Westinghouse was an independent contractor, Irby could not also be in petitioner's employment.

It is immediately dispositive of this argument to say that no case has ever held nor even suggested what petitioner urges and least of all do the cases cited by petitioner at page 10 of its Petition say so. Yet they are cited by petitioner as in conflict with the decision below and therefore are said to ground the grant of the Writ.

The impossibility of petitioner's view is manifest. To determine employment in the *Robinson* sense, the conventional tests must be made on the facts of claimed employment. The claimed employee's exact status can be determined only after that analysis is made of his relationship to his work and with the employer sought to be charged. But rather than make these tests petitioner instead bluntly states that one can never be dually employed by an independent contractor and a railroad. It insists on this conclusion by the fruitlessly repeated use of the label "independent contractor" but with an absolute failure to cite any authority to support it.

To prove this undocumented conclusion, petitioner proposes the following premise: dual employment for an independent contractor and a railroad is a ". . . new employer-employee relationship never heretofore recognized in the law."[6]

Repeatedly, petitioner has said, the courts below have held, and we agree, that "employment" under the Federal Employers' Liability Act is used in its conventional sense. We know that such conventional sense includes a wholly borrowed employee and petitioner admits that in its analysis of *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U. S. 28 (1928) at p. 14 of the Petition. We also know that an authoritatively settled form of conventionally understood employment is dual employment. *Dickerson v. American Sugar Refining Co.*, 211 F. 2d 200 (C. A. 3, 1954); *Atlantic*

6. *Id.*, p. 21. Having said this with an apparent finality, petitioner proceeds in footnote 12 of p. 21 of the Petition to suggest the undoing of its own absolute. Throughout its Petition it relies heavily upon the candid concession by counsel for respondent that Irby was not a wholly loaned employee. In footnote 12 petitioner finally admits that there can be a partially loaned or dual employment but only if such employee is performing a job ". . . *separate and apart* from his regular work for the contractor." This limitation on duality—the requirement of "*separate and apart*" (italics supplied)—makes duality non-existent. If we have an employee "separate and apart" of course he becomes a wholly loaned employee which is itself a specific form of employment. Thus neither the Restatement of Agency nor any of the cases defining dual employment imposes such a limitation. The Restatement of Agency § 226 states:

> "A person may be the servant of two masters, not joint employers, at one time as to one act, provided that the service to one does not involve abandonment of the service to the other."

It is only the petitioner who engrafts this "separate and apart" limitation on a relationship which requires in the words of *Dickerson v. American Sugar Refining Co.*, 211 F. 2d 200, 203 (C. A. 3, 1954) per Judge Staley:

> "* * * That is, a person may be the servant of two masters, not joint employers, at the same time as to the same act, provided that service to one does not involve an abandonment of service to the other. Such is the case where the employee is transferred to carry on work which is of mutual interest to both of two employers and to effect their common purpose."

Coast Line R. R. Co. v. Tredway, 120 Va. 735, 93 S. E. 560 (1917); *Siidekum v. Animal Rescue League*, 353 Pa. 408 (1946); *Bartl v. Crawford Door Sales Co.*, 394 Pa. 512 (1959); Restatement of Agency § 226.

Finally, the total artificiality of petitioner's last-ditch effort to create an issue that truly does not exist in this case is vividly demonstrated in its treatment of the *Dickerson* case, *supra*, at page 31 of its brief below in the Court of Appeals. There it said:

> ". . . In *Dickerson v. American Sugar Refining Co.*, 211 F. 2d 200 (3d. Cir. 1954), suit was brought against the owner of a clinic for employees and the issue was whether the nurse who injured plaintiff was employed by the owner of the clinic, which paid her and had the power to control her, or by the surgeon who directed her work and *was found to be an independent contractor*. In reversing a directed verdict for defendant, the court held that the jury could have found that she was the servant of both. . . . (Italics supplied.)

At that time petitioner obviously found it very easy to recognize dual employment which included an independent contractor. There is absolutely no reason why it should not be able to recognize that now.

To say this is to end the matter. Because "employment" under the Federal Employers' Liability Act is used in its conventional sense the fact that petitioner happens to be a railroad is of no more legal consequence as regards the issue of employment than if it happened to be a sugar refinery, an animal rescue league or any other form of enterprise, and it is indeed of great significance that nowhere has petitioner ever argued or suggested what legal difference there could be.

In sum the decisions below hold that where a company sells a locomotive to a railroad and where such company without contractual obligation supplies an electrical engineer who works exclusively on a railroad's equipment for

a period of 14 months, riding on it, fixing it, etc. and where there is evidence that the railroad exercises control over such engineer and he is subject to the orders of the railroad personnel and does the railroad's work, a jury question exists as to whether he is a joint employee of both the railroad and his original employer.

Such a decision is, of course, narrowly limited to those cases where the evidence is sufficient to show that the employee in question was doing the railroad's work and the railroad had the right to control him. The case is nothing more than a proper application of the cases of *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575 (C. A. 6, 1945); *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (C. A. 6, 1949) and *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161 (C. A. 6, 1947). It applies settled law and in no sense could disturb or affect any true independent contractor relationship. If a railroad executes a contract and thereafter has little or nothing to do with the direction and control of the contractor's employees, and they are not doing the railroad's work, these employees cannot be held the railroad's employees. That, of course is not this case.

As a matter of fact the Railroad has in the instant case protected itself from the damages awarded by an indemnity agreement (27a, 824a). This agreement makes the seller of the locomotives responsible for the judgment here. Undoubtedly the Railroad in most if not all of its contracts with others requires such a provision. Therefore, the mournfully dire prediction that this case would "... put to an end a long standing and widespread business practice in the railroad industry ..."[7] of hiring independent contractors is pure fiction.

No matter what the outcome of this case, railroads may and unquestionably will go on just as they have in the past hiring independent contractors and providing for indemnity agreements securing their complete financial protection. The classical industrial technique of utilizing the indemnity

7. *Id.*, p. 28.

agreement is thus a complete answer to petitioner's effort to create the impression that the result below will have a disruptive policy effect. It surely will not.

Furthermore, petitioner's argument would seem to create the impression that if it were immunized against liability under the Federal Employers' Liability Act, all of its liability problems would fall away. This too is simply not so.

Since liability will attach either under the federal or state law (depending on the facts of employment), it is inconceivable that any railroad will stop making contracts for reasons of liability exposure. Liability imposed by state laws on negligent railroads has not hindered them from making contracts for services. Liability imposed by federal laws on negligent railroads will not prevent such contracts either. In either event railroads have and regularly use a settled technique for meeting this problem: indemnity agreements. There is such an agreement in this very case.

II.

The Evidence Was Legally Sufficient.

Since the courts below applied the accepted legal standards and upheld the jury verdict, petitioner is eventually forced to argue the only question that was ever really in the case: the sufficiency of the evidence.[8]

After putting this question, petitioner then states all of the facts and inferences favorable to it. It ignores as it did in its appeal below, the fact that Chief Judge Kirkpatrick said:

> "... I would not go so far as to say that these witnesses were hostile, but if was quite evident that several

8. Petitioner (Petition, p. 20) states the matter thus: "There Was No Valid Basis for a Jury Finding That Decedent Was the Employee of the Railroad and of an Independent Contractor at the Same Time."

> of them were thoroughly enlisted in the cause of their employer and the jury would have been justified in discarding at least some of their testimony . . . ."[9]

Moreover it tries to forget that respondent was awarded the jury verdict.

In contrast to petitioner's statement of the facts the court below relied upon the following facts:

Since there was no contract between the Railroad and Westinghouse,[10] the Railroad had the right to direct what Irby should or should not do with the Railroad's equipment (811a). The equipment was owned by the Railroad and the work was being done on its premises. Marsh, a Railroad superintendent of equipment, testified that if there was a locomotive defect, Irby would let the supervisor for the Railroad know ". . . and we [the Railroad] would decide what would be done" (325a). Coleman, a Westinghouse man, testified that the railroad would have to agree to what Westinghouse planned to do from an engineering standpoint before it could be done (214a). Both of these men were petitioner's own witnesses.

> ". . . the Railroad could not 'fire' him from his employment with Westinghouse, but it could, without consulting Westinghouse 'fire' him from his job with the Railroad on the locomotives if he did not do the work it wanted done or did not do it in the way it wanted him to."[11]

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9. Petition, Appendix, p. 7.

10. Petitioner has assumed throughout that Westinghouse was an "independent contractor". It may well be that with respect to the sale of the locomotive, the term "independent contractor" could be stretched to include Westinghouse. Actually, even as to this Westinghouse would be more accurately called a seller. Since there was no contract between Westinghouse and the Railroad which sets forth any terms under which Irby worked, oral testimony was necessary to show the relationship. All of this was, of course, for the jury to believe or disbelieve.

11. Petition, Appendix, pp. 5, 6.

This is certainly a legitimate inference from the record. It was the equipment of the Railroad, and it is carping to say that the conclusion is not supported by the record. Even Marsh, who certainly was ". . . thoroughly enlisted in the cause of '[his] employer'" reluctantly admitted that they could have ordered Irby off their engines or even out of the Railroad's shop (327a-328a).

The Railroad selected both the time and place for the work to be done (812a). Marsh testified that if the Railroad desired to keep a locomotive in service it could and did tell Irby not to work on it (332a), and when there was something which was not an emergency the Railroad would tell Irby to wait until the monthly inspection period (326a-327a). This is but another element of the right to control the "undertaking as a whole."[12]

Irby was on Railroad call twenty-four hours a day, and when the locomotive would break down on the road someone from the Railroad would call him and tell him to come and report there (151a).

The Railroad shop foreman would point out the work to be done and Irby would be expected to do it (812a). The reasonable inference from the evidence is that Irby *had* to do it (96a).

Irby would ride in the cabs of the locomotives and, under orders, performed and could be expected to perform tasks normally those of the brakemen and firemen. When he did so he was under the control of the Railroad engineer (812a). He was doing work totally foreign to his normal work as an electrical engineer at Westinghouse shops. It is in the face of this kind of critically important evidence that petitioner speaks so curiously of respondent's total failure to establish Railroad control.

Thus, the Railroad told Irby where, when and, at times, what to do. This was a demonstration of both the right and the power to control.

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12. *Jones v. George F. Getty Oil Co.*, 92 F. 2d 255, 263 (C.A. 10, 1937).

The other test of employment substantiated by *Robinson, supra*, and those cases following it is "whose work" was the person doing. There is ample evidence to sustain the finding that the decedent was doing the work of the Railroad. The decedent usually reported to Mr. Shinn, the Pennsylvania Railroad Company's boss when he came to work (72a), and told him when he was leaving (73a). If the decedent found anything wrong on the locomotives, on the monthly inspections, he would report to the Pennsylvania Railroad Company people about the difficulty and they would include it on the monthly inspection report (81a). The Railroad is compelled by law to make these inspections (51a). Irby would ask for men to assist him in getting the conditions corrected and the Railroad foreman of the Wilmington shops would order his men to work under Irby. They in turn took orders from him (71a, 88a-89a). We may be sure that the Pennsylvania Railroad Company would not have supplied these railroad men if it were not very deeply convinced that they, along with Irby, were genuinely doing Pennsylvania Railroad work. Indeed, there was square testimony to the effect that the decedent's services were of great benefit to the Pennsylvania Railroad Company (91a). The Pennsylvania Railroad Company's men and he made the repairs together (91a).

Petitioner initially admitted that "decedent in the thirty-six hours immediately preceding the accident was completing the inspection and servicing of the electrical equipment on Pennsylvania Railroad Company's engine 4996 during its monthly overhaul" (137a). The locomotive was in for a regular monthly inspection and that was being done at the time (52a). Just shortly before this accident occurred the decedent had been engaged in the undercutting of the commutator (stoning) (83a). What the decedent was doing on the commutator was also known as "truing up" (82a). This is a simple job that any regular railroad electrician could have done (90a). Having stoned the commutator, the decedent at the moment of the accident was

working in the number two switch compartment of the locomotive near the transformer blower motor running contactor (164a). He was not engaged in working on the ignitrons which were the only distinguishing feature in this locomotive that set it apart from all other electric locomotives (113a-114a). The man assigned to assist Irby was one Moore, a regular Pennsylvania Railroad Company employee (85a-86a).

Monthly inspection by the Pennsylvania Railroad Company calls for an inspection of the generator for worn commutators and brushes (115a). Actually, the decedent was working with his own hands doing this job—engaged in manual labor, not supervision (218a). Hence, the decedent was doing ordinary routine work shortly before and at the moment of the accident that normally would have been done by a Pennsylvania Railroad Company employee. In so acting he was certainly doing the work of the Pennsylvania Railroad Company. When he rode on the locomotive (as he frequently did) on its runs over the defendant's system and called signals, watched the right of way and checked passing trains for protruding dangers, he was rendering a service as a Pennsylvania Railroad employee alone and in no way even remotely associated with the duties normally performed by a Westinghouse electrical engineer.

The petitioner had produced certain green sheets as part of its case, examination of which revealed twenty-two individual items which the jury could have found the respondent's decedent had done which were obviously ordinary every day bread and butter jobs that regular Pennsylvania Railroad Company men would do (231a-238a). The individual pieces of equipment which were being worked on were not things which were singular or peculiar to this particular locomotive; they were common to all locomotives that the Pennsylvania Railroad Company has and Pennsylvania Railroad Company men regularly repaired them (236a-239a). Yet, we find from an examination of Irby's

own green papers which the petitioner produced in the case that he did do that sort of work. There was nothing among those things that he did repair that a Pennsylvania Railroad Company man could not have done (238a) including stoning a commutator which is done on every electric locomotive and which Pennsylvania Railroad Company men regularly do (240a).

All of this work was typical, regular, routine labor representative of that which the Railroad does on all its other locomotives. Since ordinarily it has its own employees do such work and since much of it was done in connection with the monthly inspections which under the regulations of the Interstate Commerce Commission (49 C. F. R. 91.51 and 91.331) are supposed to be done by a railroad company itself, it was non-delegable labor.

All of this evidence of control and evidence that Irby was doing the Railroad's work was submitted to the jury. It was substantial, credible evidence. Its sufficiency has been diligently and accurately reviewed by Chief Judge Kirkpatrick and the Court of Appeals. It has been held to be sufficient. Palpably, this narrow question is not one which should be reviewed by this Court, and least of all when it has received the extremely careful consideration it has in the courts below and the consequent correct result.

CONCLUSION.

It is respectfully submitted that for the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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